Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-237

AT&T COMMENTS

Pursuant to Section 1.415(a) of the Commission's Rules, 47 C.F.R. § 1.415(a), AT&T Corp. ("AT&T") submits these comments on the proposals in the Commission's NPRM herein[1] for rules implementing new Section 259 of the Communications Act, as amended, which mandates the sharing of network infrastructure, technology, and information by incumbent local exchange carriers ("ILECs") with "qualifying carriers" as defined in that statute and the Commission's rules thereunder.

As the NPRM (¶¶ 2-3) correctly points out, the underlying purpose of Section 259 (like that of the Telecommunications Act of 1996 of which it is a part) is to further opportunities for competitive entry into local exchange markets, and to promote universal service. However, while Section 251 of the Communications Act (47 U.S.C. § 251) provides the vehicle for the ILECs'

[1] Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996, CC Docket No. 96-237, Notice of Proposed Rulemaking, FCC 96-456, released November 22, 1996 ("NPRM").

provision of interconnection and unbundled network elements to entities that will compete with those established carriers in their own service areas, Section 259(b)(6) by its express terms requires infrastructure sharing by the ILECs solely for the purpose of providing services to consumers outside of the ILEC's service territory. In light of this key difference between these sections of the Act, it is critical that the Commission prescribe criteria for identifying "qualifying carriers" under Section 259 that will maintain consistent and predictable application of the two statutory provisions.[2]

Section 259(d) establishes two essential criteria for determining a "qualifying carrier." First, such an entity must provide exchange service, exchange access, and other services included in "universal service" throughout a service territory in which that entity has

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[2] It is likewise essential that the Commission carefully tailor its definition of facilities and information subject to sharing to accomplish the statutory purpose. While the NPRM's proposed treatment of such matters is largely correct, the proposal (¶ 15) to require qualifying carriers to pay licensing or right-to-use ("RTU") fees to ILECs for software is clearly unwarranted. A user of a personal computer ("PC") that purchases software is entitled to load and use it on the PC and to allow others to use that same PC without incurring a new license fee to the software vendor. Similarly, ILECs that have obtained the right to use software generics from their switching vendors are entitled to use those facilities to serve not only their own traffic, but also to serve qualifying carriers that share the incumbent carriers' infrastructure under Section 259 without any additional costs or fees.

been designated as an "essential telecommunications carrier" under Section 214(e) of the Act. AT&T does not expect that there will be any serious difficulties in interpreting or applying this provision, because the Commission in CC Docket 96-45 is presently considering recommendations by the Federal-State Joint Board regarding the specific offerings to be included in carriers' universal service obligations.[3]

The second, and more problematic, statutory criterion provides that a qualifying carrier must "lack[] economies of scale or scope" as determined in accordance with regulations prescribed by the Commission. As the NPRM (¶ 37) points out, identification of the particular carriers that satisfy this standard for any specific facility or set of facilities could entail a case-by-case analysis of the carriers' and ILECs' relative investment costs. Such a procedure would be incredibly burdensome for putative qualifying carriers, ILECs, and the Commission.

Rather than adopt such an administratively unworkable process, the Commission should adopt the alternative proposal in the NPRM (¶ 37) and establish a rebuttable presumption that carriers with certain size characteristics, in terms of number of lines served, lack

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[3] See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Recommended Decision, FCC 96-J3, released November 8, 1996.

economies of scale and scope and thus are "qualifying carriers" under Section 259(d). The NPRM (id.) points out that such a procedure would accord with the apparent Congressional purpose of benefiting smaller carriers through infrastructure sharing.

As the NPRM (id.) also correctly notes, the Communication Act's definition of a "rural telephone company" offers an appropriate basis for identifying carriers that can be expected to lack economies of scale or scope. Under Section 3(37) of the Communications Act (47 U.S.C. § 153(37)), carriers that serve communities of fewer than 10,000 persons, and that serve fewer than 50,000 access lines in a study area with fewer than 100,000 lines are classified as rural telephone companies. Entities that satisfy these limitations can also reasonably be expected to lack the ability to develop either economies of scale (given their limited opportunities to increase output) or economies of scope (in view of their relatively limited range of service offerings).

These criteria can only be effective, however, if the determination of rural telephone company status is applied at the holding company level for purposes of Section 259(d) qualification. Entities that hold multiple local telephone companies, and can therefore recoup their investments in infrastructure, technology and information from those subsidiaries' customers, clearly have exactly

those opportunities for economies of scale and scope that Section 259 reserves for "qualifying carriers" that lack such capabilities. Applying the test at this level would also comport with the Commission's decision in Docket 96-98, which applied the Section 251(f)(2) interconnection exemption for "rural carriers" at the holding company level. As the Commission noted there, "any other interpretation would permit almost any company . . . to take advantage" of a statutory provision intended to apply solely to a narrow subset of eligible carriers.[4]

WHEREFORE, the Commission should adopt the guidelines described above for determination of a "qualifying carrier" under Section 259(d).

Respectfully submitted,

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[4] See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325, released August 8, 1996, ¶ 1264.